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Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Jan. 10, 1900.

C. P. HUNTINGTON, as Special Receiver of the Central Land Company of West Virginia,

Appellant,

vs.

JOHN B. LAIDLEY, W. S. LAIDLEY, THOMAS J. BRYAN ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANT.

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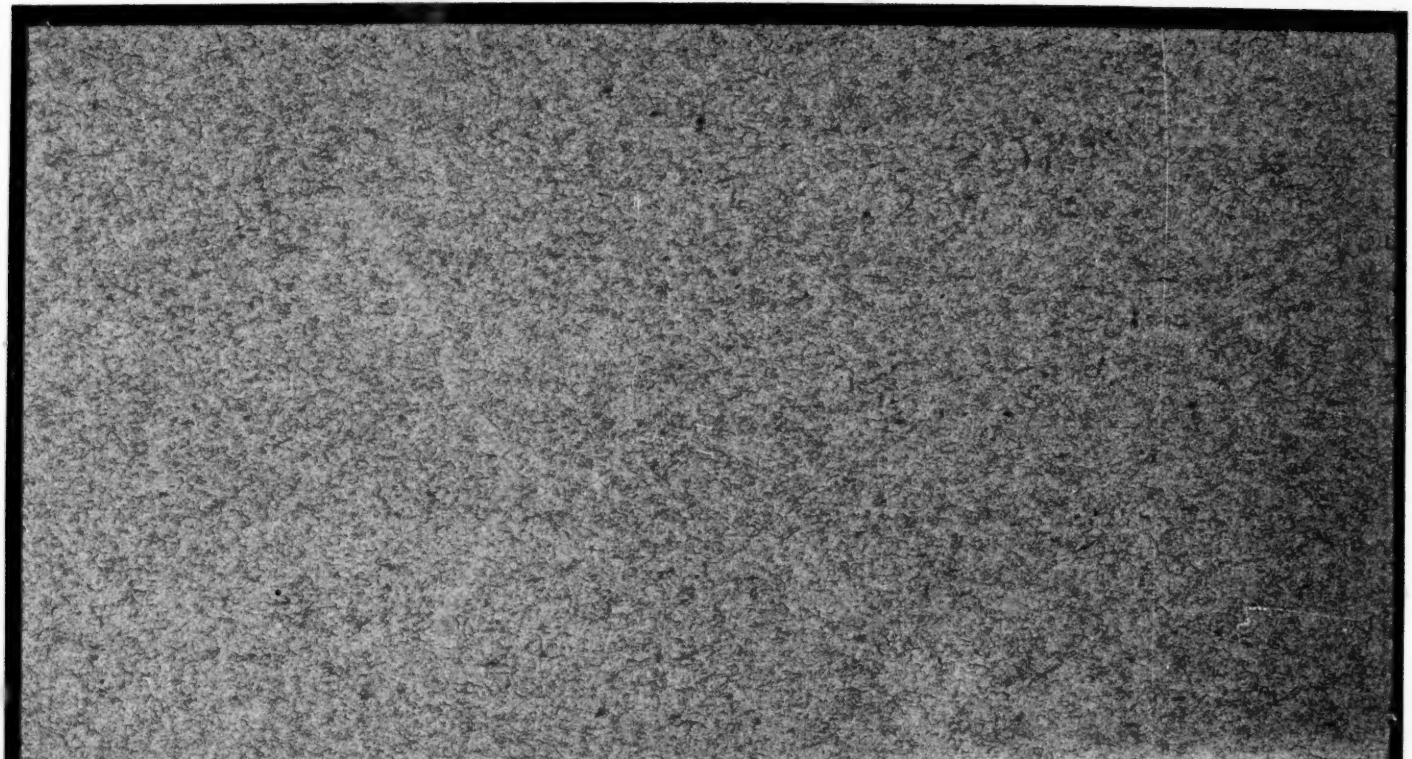

Supreme Court of the United States.

OCTOBER TERM, 1899. No. 105.

C. P. HUNTINGTON, as Special Receiver of the Central Land Company of West Virginia,
Appellant,

vs.

JOHN B. LAIDLEY, W. S. LAIDLEY, THOMAS J. BRYAN ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Statement.

During the year 1870, and for a long time prior thereto, C. P. Huntington, the complainant in this cause, in his individual capacity employed a man by the name of Albert Laidley (father of the defendant John B. Laidley) to acquire for him in the State of West Virginia large tracts of farm and wild land in the vicinity of where the City of Huntington, West Virginia, is now situated. Albert Laidley was a lawyer, and Huntington relied entirely upon him for the examination of the titles to this land and for the preparation

of the deeds therefor, and it was part of the duty of the said Albert Laidley to see that the deeds for such lands were properly executed, and that the proper certificates of acknowledgment were attached thereto. All these matters were left by Huntington in the charge of Albert Laidley, and Huntington relied solely upon the skill and professional training of Laidley in this regard (Record, p. 55).

Some of the tracts of this land were conveyed first by the original vendors to Albert Laidley, and then by Albert Laidley and his wife to Huntington; but the particular tract in question, known as the Pennybacker tract, which consisted of about 240 acres of land now within the corporate limits of the City of Huntington, was conveyed direct to Huntington by the vendor Sarah H. G. Pennybacker and her husband, John M. Pennybacker, by deed dated the 25th day of February, 1870. In the deed, however, dated April 13, 1870, from Albert Laidley and his wife conveying to Huntington the tracts of land acquired by said Laidley this Pennybacker tract of land is specifically referred to and conveyed as follows: "and also his entire interest in a tract of land containing 240 acres, purchased of J. M. Pennybacker and wife by said Laidley and conveyed by his directions to C. P. Huntington, *the title to which the said Laidley covenants to warrant and defend generally*" (Record, p. 75).

On or about the 16th day of October, 1871, Huntington and his wife conveyed the Pennybacker tract together with the other property acquired through Albert Laidley to the Central Land Company of West Virginia (Record, pp. 76, 79).

The Land Company at once improved the property, divided it into lots and sold a part thereof. During this time Mrs. Pennybacker lived in the City of Huntington, and was aware of the improvements upon the property and of its increase in value (Record, p. 52).

On the 7th day of December, 1876, Albert Laidley died and his son John B. Laidley became the admin-

istrator of his estate (Record, p. 140). Prior to the death of Albert Laidley his son John B. Laidley, who was also a lawyer, had been employed as a clerk and otherwise in his father's office and was familiar with his affairs (Record, p. 56).

As to the relations between John B. Laidley and his father, the allegations in the amended bill are as follows :

> " That, as this complainant has learned since the filing of his original bill, at and during the time of the employment of the said Albert Laidley, as aforesaid, and while he was so engaged as the confidential agent and attorney of this complainant, the defendant John B. Laidley was a member of the family of the said Albert Laidley, and had, out of the large and liberal payments made by this complainant to the said Albert Laidley (who was theretofore in very humble circumstances), been boarded, clothed, maintained, educated and supported by his said father, as the complainant is informed and verily believes ; and for a portion, at least, of said time, was a clerk and scrivener in his father's law office at the town of Barbersville, then the county seat of Cabell County, West Virginia, in which county were situate the lands purchased for this complainant and conveyed to him through the agency and employment of the said Albert Laidley ; and the said John B. Laidley, as this complainant has learned since the filing of his original bill, was, during a portion of that time, a student of law under his father and a clerk in his said office, and at a later period of said time, as this complainant has learned since the filing of his original bill, was associated with him as partner, or jointly, in the transaction of law business, in the examination of land titles and the execution of deeds and other legal documents, as complainant

is informed and believes, and charges as true ; and during a portion of said time, while not actually associated with said Albert Laidley in the practice of law and transaction of business pertaining to the examination of titles and conveyancing, as this complainant has learned since the filing of his original bill, was an occupant of the same room or rooms with his father, and during another part of said time occupied part of a building and rooms in the same yard and enclosure, in the little village of Barbersville, in which his father had his office and home.

" And as this complainant has learned since the filing of his original bill, complainant is informed and verily believes, and here charges as true that while so a member of the family of the said Albert Laidley, and in his service and employment as such clerk and scrivener, and while receiving instruction as such student of law in his father's office, and while associated with him in the practice of law, and in the preparation of deeds of conveyance, and of the certificates of acknowledgment thereof, and in the examination and investigation of the titles to lands, the said John B. Laidley had access to all the papers, deeds and abstracts relating to the titles to lands purchased by said Albert Laidley, for complainant, and conveyed to him, and caused to be conveyed to him by the said Albert Laidley, including the said Pennybacker papers, deeds, abstracts and acknowledgments, and then and there and thereby learned and acquired in a strictly confidential way and manner, knowledge and information of and from his said father, and from said papers, deeds, abstracts and acknowledgments so accessible and open to his examination, that the acknowledgment and execution of said deed from Sarah H. G. Pennybacker and her husband (" Ex. B ") was defective, and that it might

be claimed that is was void as to the said Sarah H. G. Pennybacker, and did not bind the said Sarah H. G. Pennybacker, in whom the fee-simple to the said land was vested, and did not pass to to complainant any other or further or greater interest in said land than the husband's estate as tenant by the curtesy, by reason of a decision of the Supreme Court of Appeals of the State of West Virginia, rendered after the execution of said deed, holding and deciding that a somewhat similar certificate of acknowledgment was insufficient to constitute a due acknowledgment, and to bind a wife, which opinion and judgment of the Supreme Court of Appeals of West Virginia, for the first time, in effect reversed all decisions of the Supreme Court of Virginia, which had theretofore always held, as it has ever since held, such and similar certificates of acknowledgments to be good, valid and sufficient to pass the estate in fee owned by the wife " (Rec., pp. 56 and 57).

Thereafter, and in January of the year 1882, John B. Laidley, having theretofore ascertained by reason of his familiarity with his father's affairs, obtained while employed as a clerk in his father's office, that the acknowledgment to the deed from Mrs. Pennybacker and her husband to Huntington was in his opinion defective, approached Mrs. Pennybacker and offered to bring a suit to recover the property in question. He did not advise her that the acknowledgment to her deed to Huntington was defective, but stated to her that she had a dower right under the new Constitution of West Virginia, and suggested to her that she should talk with her friends about it, but should not consult any lawyer. He also made a proposition to her that if she did not care to go to the expense of a suit to recover this property he would give her $500 for her interest therein. Mrs. Pennybacker

consulted with her friends in regard to the matter and upon their advice agreed to convey to John B. Laidley whatever interest she had in this property for the sum of $500. She, however, stated to him that she had no interest whatever in the property so far as she knew, as she had sold it to Huntington and had received full value therefor. Her friends, however, advised her that, if Laidley was willing to give her $500 for nothing, there was no reason why she should not take it. The property at the time Laidley made this offer of $500 was worth something over $100,000, and is now of very much greater value (Record, pp. 50 and 51).

State Court Actions.

In pursuance of the offer made to Mrs. Pennybacker by Laidley the property was conveyed by her to him by deed dated January 26, 1882 (Record, p. 89), and shortly thereafter and in the month of April, 1882, John B. Laidley brought an action of ejectment against the Central Land Company of West Virginia (Record, p. 143). The case was tried, and on the 17th day of December, 1884, the jury brought in a verdict for the defendant the Central Land Company of West Virginia (Record, p. 155). A judgment was entered upon the verdict (Record, p. 156), and the case was then taken by writ of error to the Supreme Court of West Virginia and on November 26, 1887, the judgment was reversed (Record, pp. 338 and 339).

In the meantime, and in June, 1887, the Central Land Company of West Virginia filed a bill against John B. Laidley, seeking to set aside the deed from Mrs. Pennybacker to John B. Laidley of January 26, 1882, on the ground that the same was obtained fraudulently (Record, p. 222). This bill was dismissed (Record, p. 335), and the decree of dismissal was affirmed by the Supreme Court of Appeals of West Virginia (Record, p. 370).

Subsequently and in September, 1890, the action of ejectment was again tried, and a verdict found for the plaintiff John B. Laidley (Record, p. 346). After judgment was entered upon this verdict there was presented to the Judges of the Supreme Court of Appeals of West Virginia a petition for a writ of error, which was refused (Record, p. 337); and the Central Land Company of West Virginia then sued out a writ of error from this Court to the Supreme Court of Appeals of West Virginia (Record, p. 407). The case is reported in 159 U. S., 103, and was dismissed in February, 1896, by this Court for want of jurisdiction without any discussion upon the merits of the case. The opinion delivered by Mr. Justice GRAY will be found at page 413 of the Record.

RECEIVERSHIP CASE IN FEDERAL COURT.

On the 11th day of November, 1890, a bill was filed in the United States Circuit Court for the District of West Virginia by Collis P. Huntington and others against the Central Land Company of West Virginia, for the purpose of winding up the affairs of said corporation, inasmuch as its charter was about to expire (Record, p. 636). F. B. Enslow was appointed by said Court temporary Receiver of the Central Land Company of West Virginia, in accordance with the prayer of said bill, and directed to take possession of the property of the corporation in the State of West Virginia (Record, p. 638). In pursuance of the terms of said order the said Enslow took possession of the Pennybacker tract of land in question in this case, and on the 16th day of December, 1890, filed a report to the United States Circuit Court for West Virginia, *showing that on November 12, 1890, he had taken actual physical possession of all the real estate owned by said company in* West Virginia, including the 240 acres

known as the Pennybacker tract in controversy here (Record, p. 642).

Upon the same day that the temporary Receiver Enslow filed his report Huntington was appointed a special Receiver of the Central Land Company of West Virginia, and all of the property of the Land Company, including the Pennybacker tract, actually and physically taken possession of by the temporary Receiver Enslow, was turned over to and taken possession of by Huntington as such special Receiver (Record, p. 640), who has held possession of such property until the entry of the decree from which this appeal has been taken.

The order appointing Huntington special Receiver of the Central Land Company and discharging Enslow as temporary Receiver reads, so far as the Pennybacker land is concerned, as follows:

> "It is ordered that Collis P. Huntington be, and he is hereby, appointed a special receiver of this court, with power, and he is hereby so authorized, empowered and directed, to take possession of all the property belonging to the Central Land Company of West Virginia, and especially of the tract of 240 acres of land known as lot No. 4 of the Frampton land, sold by S. H. G. Pennybacker to C. P. Huntington, and by him to the Central Land Company, in the corporate limits of the city of Huntington, and F. B. Enslow, special receiver, having filed his report, showing that on the 12th day of November, 1890, he took possession of all the real estate of said company, including said 240 acres tract, he is directed to deliver same to said Collis P. Huntington, as such receiver" (Record, pp. 640 and 641).

Present Cause.

On or about the 28th day of February, 1891, Huntington as special Receiver of the Land Com pany, filed a bill against John B. Laidley and others to quiet the title to the property of the Pennybacker tract, of which he held possession as such special Receiver. Various proceedings were taken in this cause, which is the cause now before the Court, but no effort was made to bring it to a final hearing because of the pendency in the Supreme Court of the United States of the action of ejectment in the State Court, which has been heretofore referred to and which was decided in February, 1896.

After the filing of the bill in this cause an amended bill of complaint was filed on or about the 26th day of January, 1894, which contained various allegations of new matter discovered since filing the original bill in this cause, and, of course, discovered long after the trial and final determination of the ejectment action in the State Court, in which John B. Laidley was plaintiff and the Central Land Company was defendant, and of the chancery suit in the State Court, entitled Central Land Company of West Virginia against John B. Laidley (Record, pp. 56. 57, 58 and 59). This new matter tended to show that, whatever title John B. Laidley might have acquired by reason of the deed to him from Mrs. Pennybacker of January 26, 1882, and because of the decisions of the State Court in the action of ejectment and the chancery cause, was held by him in trust for the Central Land Company of West Virginia by reason of the fiduciary relations which existed between him and his father Albert Laidley at the time said Albert Laidley was employed by Huntington as his attorney to obtain for him the title to this property, and the prayer of the bill at page 67 of the Record is as follows :

"And this complainant further alleges and avers that he is advised and believes, and therefore charges to be true, that, if by the said deed (Ex. "F") of the said Sarah H. G. Pennypacker to the said defendant John B. Laidley, the legal title to said tract of land passed to the said John B. Laidley, this complainant is entitled, by reason of the premises, to a decree in this cause, compelling the said John B. Laidley, and those of the defendants holding or claiming to hold any title to any portion of said land under, by or through the said John B. Laidley, whether by direct grant and deed from the said John B. Laidley, or by intermediate conveyances and all others claiming to hold any title to said land or any part thereof under or through the said John B. Laidley to convey to him in his capacity as the Receiver of the said Central Land Company, and to those holding lots in said tract of land under and through the said Central Land Company, the legal title to the portions of said tract of land owned by and in the possession of this complainant as said receiver, and owned by and in the possession of those holding lots in said tract of land under and through the said Central Land Company, as hereinbefore set out, which said title he, the said John B. Laidley, and those of the defendants and all others whose titles and holdings are unknown to this complainant who hold or claim to hold any title to any portion of said land under, by or through the said John B. Laidley, as aforesaid, hold in equity as trustees for the benefit of this complainant and those holding lots in said tract of land under and through the said Central Land Company, as hereinbefore stated; and, therefore, in consideration of the premises, and inasmuch as this complainant is without adequate remedy at law, this complainant prays that the

defendant John B. Laidley and those of the defendants holding or claiming to hold any title to any portion of said land under, by or through the said John B. Laidley, whether by direct grant or deed from the said John B. Laidley, or by intermediate conveyances, may be compelled by a proper decree to be made herein to convey to this complainant, in his capacity as the Receiver of said Central Land Company, and to the grantees of the said Central Land Company and those claiming under them respectively by deed of special warranty, the portion of said tract of land so held and claimed by them under their several deeds, as hereinbefore mentioned."

In other words, there was alleged in the amended bill an entirely new cause of action against John B. Laidley which was absolutely unaffected by the State Court suits between Laidley and the Central Land Company.

To this amended bill the defendants demurred (Record, p. 121; Record, p. 127), and afterwards and on the 27th day of February, 1896, withdrew their demurrers (Record, p. 510) and filed a joint and separate plea and answer to the plaintiff's amended bill of complaint (Record, p. 132).

Thereafter and on the 24th day of April, 1896, the complainant in this cause obtained an order returnable June 16, 1896, directing the defendants to show cause why their plea and answer filed February 23, 1896, should not be stricken from the files of the Court as irregular and ineffective and as not being in conformity with the rules and practice of the Court, for the reason that the defendants, having pleaded to the whole bill had, nevertheless, answered all or portions of the bill. The defendants were also directed to show cause why the amended bill of complaint should not be further amended (Record, p. 511).

The hearing upon this order set for June 16, 1896, was upon that day continued until the 21st day of December, 1896, and the motion to amend the bill by inserting certain words omitted therefrom by inadvertence, was granted, and the defendants thereupon filed to the bill as amended the same plea and answer they had previously filed in the cause. The motion to strike out such plea and answer was thereupon argued before Judge JACKSON and Judge GOFF, and was denied, on the 31st day of March, 1897, and an opinion filed by Judge GOFF (Record, pp. 515 to 517).

On the same day—viz, March 31, 1897—the defendant Laidley moved to dissolve the injunction awarded in this cause, and the motion was set down for argument on June 24, 1897 (Record, p. 518). Upon the 31st of March, 1897, a motion was also made by the defendant John B. Laidley, to remove the complainant Huntington as Receiver of the Land Company. This motion was also returnable June 24, 1897 (Record, p. 646).

Afterwards and on the 14th day of May, 1897, the complainant served a notice of argument upon the defendants setting down their plea and answer for argument on June 24, 1897 (Record, p. 519), the same day which had been set for the argument of the motions to dissolve the injunction in this cause and to remove Huntington as receiver.

On June 24, 1897, all the arguments were continued until July 12, 1897, when the question whether the plea and answer of the defendants to the amended bill were good was fully argued, and the plea and answer of the defendants were overruled and leave given the defendants to file an answer to the plaintiff's bill and amended bill on or before the next rule day (Record, p. 519).

The order of the Court overruling the plea and answer of the defendants was as follows :

"And at another day—to wit, on the 12th day of July, 1897, the following order was made and entered of record, to wit:

C. P. Huntington, Special Receiver, &c., vs. John B. Laidley *et al.* } In Chancery.

"This day this cause came on to be heard upon the plea of the defendants, John B. Laidley and others, of '*res adjudicata*,' heretofore filed and set down for argument, and the court, having heard the argument of counsel on said plea and fully considered the questions arising thereon, is of the opinion that the said plea as a plea to the whole bill as amended is not a proper plea, and that the same should be rejected.

"It is therefore adjudged, ordered and decreed that said plea of '*res adjudicata*' be, and the same is, overruled; and the defendants have leave to answer the plaintiff's bill and amended bill on or before the next rule day" (Rec., p. 519).

On the same day the motion to dissolve the injunction awarded in this cause was also argued and it was ordered that said injunction should be continued and the motion to dissolve the same be overruled (Record, p. 520). The motion to remove Huntington as Receiver of the Land Company was also argued on July 12, 1897, and denied (Record, p. 647).

Thereupon and on July 13, 1897, the defendant Laidley filed another plea and answer to the complainant's amended bill (Record, 521). The other defendants did not interpose any plea, but simply joined issue with the complainant and filed an answer to the amended bill of the complainant on September 4, 1897 (Record, 536).

On the 4th day of September, 1897, the complainant obtained an order to show cause returnable January

10, 1898, why the plea and answer filed by the defendant John B. Laidley on July 13, 1897, should not be stricken from the files of the court as irregular and ineffective, and as not being in conformity with the rules and practice of this court (Record, p. 534), and on the 4th of October, 1897, filed a general replication to the answer of the defendants other than John B. Laidley filed September 4, 1897 (Record, p. 550).

It appearing that the defendant John B. Laidley and his attorneys Z. T. Vinson and William R. Thomson were about to sell a portion of the 240 acres involved in this cause, under orders of the State Court obtained in the actions of ejectment against the grantees of the Land Company before referred to, in violation of the injunction orders theretofore issued in this cause, the complainant in this cause thereupon, and on the 17th day of December, 1897, filed his petition in the United States Circuit Court of the District of West Virginia, and obtained thereon an order directing the said John B. Laidley and his attorneys Z. T. Vinson and William R. Thomson to show cause, on the 20th day of December, 1897, why they should not be fined and attached for contempt of the injunction orders issued in this cause (Record, pp. 550 and 551).

Answers to this rule to show cause were filed by John B. Laidley and by his attorney Thomson on the 20th of December, 1897 (Record, p. 574; Record, p. 563), and the hearing thereon was set for January 20, 1898.

As the cause was at issue as to all the defendants, except the defendant Laidley, and the time to take testimony in said cause so far as such defendants were concerned was shortly to expire under the rules of the court, the complainant, on the 20th day of December, 1897, applied to the Court for an order extending the time for taking testimony therein until after the cause was at issue as to the defendant Laidley—that is to say, until 90 days after the hearing of the motion to strike out the plea and answer of the defendant Laid-

ley as not being in accordance with the rules and practice of the court and of the motion to punish Laidley and his attorneys for contempt in violating the injunction heretofore issued in this cause. The application was granted (Rec., pp. 579 to 581).

The argument upon the motion to punish John B. Laidley and his attorneys for contempt in attempting to sell a portion of the property involved in this cause under the orders of the State Court ejectment actions was adjourned from time to time and was finally argued before Judge GOFF and Judge JACKSON upon the 3d day of March, 1898. The argument of the motion to strike out the plea and answer of the defendant Laidley filed on the 13th day of July, 1897, had also been adjourned until the 3d of March, 1898, but was not heard upon that day, and was continued to be heard after the disposition of the motion to punish the defendant Laidley and his attorneys for contempt.

Upon the first day of the June Term of the United States Circuit Court for the District of West Virginia, held at Parkersburg, West Virginia, on the 10th day of June, 1898, Judge GOFF orally announced that he had decided to deny the motion to punish Laidley and his attorneys for contempt upon the ground that in his opinion the United States Circuit Court was without jurisdiction to grant the injunction issued in this cause. JUDGE GOFF FURTHER ANNOUNCED THAT HE WOULD ALSO DISMISS THE BILL AND AMENDED BILLS IN THIS CAUSE ON HIS OWN MOTION ON THE GROUND THAT THE UNITED STATES CIRCUIT COURT, DISTRICT OF VIRGINIA, HAD NO JURISDICTION OVER THIS CAUSE, AND HE SET THE 25TH DAY OF JUNE, 1898, AS THE DATE FOR THE ENTRY OF FINAL DECREE IN SAID CAUSE. NO WRITTEN OPINION WAS EVER FILED BY JUDGE GOFF SETTING FORTH HIS REASONS FOR MAKING SUCH A SUMMARY DISPOSITION OF THE CASE.

On the 25th day of June, 1898, an order was entered denying the motion to punish John B. Laidley and his attorneys W. R. Thomson and Z. T. Vinson for con-

tempt, and the rule for contempt was discharged (Record, p. 582), and on the same day, viz., June 25, 1898, the final decree was entered in this cause dismissing the bill and amended bills therein without hearing and on the Court's own motion under the authority given by the fifth section of the Act of Congress approved March 3, 1875 (18 Stat., at p. 470), upon the ground that this cause did not really and substantially involve a dispute or controversy properly within the jurisdiction of the United States Circuit Court for the District of West Virginia, because of the pendency in the State Court prior to the commencement thereof of certain actions of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia and its grantees were defendants, and of the chancery cause in said State Court in which the Central Land Company was plaintiff and John B. Laidley and others were defendants, which was brought in said State Court prior to the commencement of this cause (Record, p. 648).

From the final decree dismissing this suit upon the Court's own motion on the ground that the Court had no jurisdiction thereof this appeal was taken direct to this Court under the provisions of the 5th section of the Act of Congress, approved March 3, 1891, and entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes" (Record, p. 649), and there was obtained, as is required by said act, a certificate certifying to this Court for decision the question of the jurisdiction alone of the United States Circuit Court for the District of West Virginia over this cause (Record, p. 652).

Specification of Errors.

FIRST. The Circuit Court of the United States for the District of West Virginia erred in that it dismissed this suit for want of jurisdiction upon its own motion under the provisions of the Fifth Section of the Act of Congress, approved March 3, 1875, and entitled, "An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State Courts and for other purposes" (18 Stat. at Large, p. 470).

SECOND. The said Circuit Court erred in entering upon its own motion the final decree here appealed from upon the ground that it was required to dismiss this cause because it appeared to its satisfaction that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Court (notwithstanding that said Court had the first actual physical possession of the land in controversy), because of the pendency in the State Courts of West Virginia prior to the commencement of this suit of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, and of the Chancery cause in which the Central Land Co. of West Virginia was plaintiff and John B. Laidley and others were defendants.

FIRST POINT.

The Court below had jurisdiction of this cause.

The case comes direct to this Court under the fifth section of the Circuit Court of Appeals Act (26 Stat. at Large, p. 826); and the single question presented upon the appeal is whether the Circuit Court of the United States for the District of West Virginia, which had taken possession of the property in question on the 12th day of November, 1890 (Record, p. 642), through its Receiver appointed in the cause brought in said Court to wind up the affairs of the Central Land Company, in which C. P. Huntington and others were plaintiffs and The Central Land Company was defendant, was unable to take jurisdiction of this cause brought by its own Receiver to remove a cloud upon the title to his property, and to have John B. Laidley declared to hold as trustee for the Central Land Company the title to the land which he had acquired by the deed to him from Mrs. Pennybacker, dated the 26th day of January, 1882, simply because of the pendency in the State Court of West Virginia of the actions of ejectment brought in 1882 by John B. Laidley against the Land Company and its grantees, and because of the chancery cause in the State Court brought by the Land Company against John B. Laidley.

The question, as stated in the certificate required by the 5th Section of the Circuit Court of Appeals Act, is as follows:

> "Is this court without jurisdiction of this cause because of the pendency in the State Court prior to the commencement of this suit of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, which was begun in the Circuit

> Court of Cabell County, West Virginia, on the first Monday in April, 1882, and of the other actions in ejectment brought prior to this cause in said State Court by the said John B. Laidley, as plaintiff, in relation to the property in question in this suit and of the Chancery cause in which the Central Land Company of West Virginia was complainant and John B. Laidley and others were defendants, which was brought in said State Court prior to the commencement of this cause" (Record p. 652).

The statute under which the Court below acted in dismissing the case was approved March 3, 1875, and is entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes" (18 Stat. at Large, 470), and in its fifth section provides:

> "That if, in any suit commenced in a circuit court, * * * it shall appear to the satisfaction of said circuit court at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit."

It has been settled by the decision in Wetmore vs. Rymer, 169 U. S., 115, that the action of the Circuit Court in dismissing the case is reviewable by this Court.

In considering this matter there are certain facts to be constantly kept in mind, and they are:

> FIRST. The character of the suit in the Federal Court in which the property was actually seized. It was a suit brought for the purpose of winding up the affairs of the Land Company and of placing

its property in the possession and custody of the Court. Its primary object was to take at the outset and equitably administer the property of the Land Company.

SECOND. The character of the actions in the State Court. They were all *in personam*, and none of them looked to any seizure and taking by the Court of the land in question. These actions in no way sought to take the Pennybacker tract into the custody of the Court and do with it as equity might require. They were simply actions *in personam* involving the ownership of the land, and were not eventually terminated until five years or more after the property had been seized by the Federal Court.

THIRD. There is no pretense that the State Court ever took actual physical possession of the land in question prior to its seizure by the Federal Court.

FOURTH. The property was taken possession of by the Federal Court to be administered as justice might require and subject to any rights and title thereto which might be established in the State Court or anywhere else.

FIFTH. The seizure of this land by the Receiver appointed by the lower court did not occur in the cause now before the court, but took place prior to the commencement of this case in the suit brought to settle up the affairs of the Land Company, and the right of the Federal Court to the custody of the property lies between the receivership suit and the State Court actions of ejectment.

SIXTH. Whether the Federal Court in a suit brought to wind up the affairs of a corporation had the right to take possession of this land by its Receiver resolves itself into this question: Is a Receiver prevented from taking into his hands real estate which he is ordered by the Court appointing him to seize by the mere fact that an ejectment

action is pending in the State Court involving the title to the property?

SEVENTH. The present cause seeks to have John B. Laidley declared to hold in trust for the complainant the title which the said Laidley acquired from Mrs. Pennybacker, and which was established in the State Court ejectment actions. That is to say—the case at bar is entirely independent of and has no connection with the State Court cases, and the judgments therein are in no way a bar to or *res adjudicata* in the present case. This very point was decided by the Circuit Court when it overruled the plea of *res adjudicata* (Record, p. 519) and gave the defendants leave to answer the allegations of the bill. In other words, the bill prays for relief upon evidence not known at the time of the trial of the ejectment actions upon the equitable doctrine that, as an attorney cannot avail himself of an after-acquired title to the detriment of his client, an attorney's clerk and one who otherwise had the close relations which existed between Albert Laidley and his son John B. Laidley cannot take advantage of such after-acquired title.

Another important fact not to be overlooked in the consideration of this appeal is that the case, after pending for seven years, was dismissed upon the Court's own motion, without any hearing or argument upon the question of whether the Court could take jurisdiction or not. This cause was commenced in 1891, and, at the time it was dismissed in 1898, was pending before Judges GOFF and JACKSON upon a motion to punish John B. Laidley for the violation of an injunction issued early in the cause. In 1892 the injunction was sustained after full argument by Mr. Chief Justice FULLER (Record, p. 34). The same injunction had been sustained by Judge GOFF and Judge JACKSON as late as July 12, 1898, when a motion to dis-

solve the injunction was denied (Record, p. 520). The contempt of Laidley was the advertising for sale of a portion of the land in question under orders obtained in the State Court ejectment actions. The injunction in this suit was one for the purpose of preserving the property *pendente lite*, and restrained the defendant from in any way interfering with the possession of the Receiver. It had already been decided in this case after full argument before Judges GOFF and JACKSON that the plea of *res adjudicata* filed by the defendant to the bill must be overruled, inasmuch as the bill of complaint stated a cause of action not barred by the judgments in the State Court cases (Record, p. 519). All of the defendants except Laidley had answered the bill, and the time of the complainant to take testimony had been extended until the case should be at issue as to all the defendants. The defendant Laidley had filed a plea and answer and a motion had been made by complainant to strike this plea and answer from the files as not being in accordance with the rules and practice of the Court (Record, p. 534). It was while this motion was pending and before it was argued that Laidley violated the injunction, and the two motions—the one for the violation of the injunction and the one to strike out the plea and answer—were set for argument upon the same day. The first motion was argued, but the motion to strike out the plea and answer was adjourned until the contempt motion was disposed of.

To repeat, the situation of the case when the motion to punish Laidley for contempt came on for argument was this: It was not at issue, except as to certain of the defendants, and as to such defendants the time of complainant to take his testimony had been extended. Motions by defendants to dissolve the injunction which Laidley was charged with violating had been denied over and over again. Less than a year before the argument of the motion to punish Laidley for contempt Judges GOFF and JACKSON had overruled the defendant's plea of *res adjudicata* and had by so

deciding substantially determined that the complainant was entitled to go ahead and try his case.

We dwell upon the condition of the case at the time this contempt motion came on for argument for the purpose of showing how entirely without a hearing of any kind upon the question of jurisdiction the case was summarily dismissed. It had just been decided by the very Judges who sat to hear the argument upon the motion to punish Laidley for contempt that the bill of complaint stated a good cause of action (Record, p. 519), and that the motion to dissolve the injunction must be denied (Record, p. 520). We, therefore, were lulled into security upon any question of jurisdiction and argued before the Court simply and solely the question then before it, viz.: whether Laidley had been guilty of contempt in trying to dispose of a portion of the property pending the suit. To this question alone the complainant's counsel addressed themselves, and, upon a decision against them on this question by a divided court, they were informed by Judge GOFF, who gave no written opinion stating his reasons for so doing, and gave counsel for complainant no opportunity to be heard upon the question, that he would dismiss the entire case upon the ground that the Court had no jurisdiction thereof. In Hartog vs. Memory, 116 U. S., 588, 591, it was said that "when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the Court of its own motion, *justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence.*" It is to be noted that in every hearing in this case there were present Judges GOFF and JACKSON, and that Judge GOFF, as Circuit Judge, had the deciding vote. As a matter of fact the two judges differed in opinion upon the question of the dismissal of this case, although this does not appear clearly upon the record, so that this case—more than seven years after it had been begun—was sum-

marily dismissed by an evenly divided court upon a question which had never been argued before it.

Because of the peculiar judicial system in this country and the constant recurrence in the courts of cases over which both the Federal and State Courts have jurisdiction so far as the parties and subject-matter are concerned, there has arisen a principle of comity which has developed into a settled rule of law to the effect that, whichever of the two Courts has in the progress of the cause before it first taken actual physical possession of the property involved therein, such Court shall retain, until the end of the litigation in which the property was seized, exclusive jurisdiction of all proceedings in regard thereto. The purpose and object of this rule was, of course, to obviate any unnecessary or unseemly clash between the two Courts. Some plain and simple rule for the guidance of the Courts in a situation which might at any time become difficult and tend to unfortunate conflicts between State and Federal authorities was necessary, and the simplest rule seemed to be that that Court which had taken the property into its custody and control should have the exclusive jurisdiction of the case.

The abstract question arising in this case is as follows: Does the mere fact of the prior commencement of a State Court suit *in personam*, not looking to the taking of the property *in gremio legis*, as by a Receiver, prevent a Federal court (1) from taking possession of such property by its Receiver, and (2) of thereafter taking jurisdiction of a suit brought by such Receiver in regard thereto, when such suit is entirely independent of, and unaffected by, the case in the State Court?

We must keep clearly in mind that the Pennybacker tract was seized by the Receiver of the Federal court appointed in the suit brought to wind up the affairs of the Central Land Company, and that such Receiver, having possession of the property, brought upon new evidence this present suit in the Federal Court to have the title acquired by Laidley from Mrs. Pennybacker

and sustained in the State Court cases declared to be held by him in trust for the Land Company. In this present suit the Receiver could not of course seize possession of the property as he already had taken such possession under the orders in the suit appointing him Receiver, but there was an injunction order entered in this suit for the purpose of preserving the property *pendente lite*.

It is not at all plain upon just what theory the Court below so summarily disposed of this case, especially as no opinion was filed, but it is difficult to see how the Receiver could have acted otherwise than he did. He was made Receiver in November, 1890, and directed to take possession of all the property of the Central Land Company. The Pennybacker tract was at the time the property of the Land Company and the Receiver under the order of the Court took possession of it and he certainly would not have performed his duty as Receiver unless he had taken possession of it. It is true that at the time the Receiver of the Land Company was appointed John B. Laidley had recovered a judgment in the State Court ejectment action, but the case had been taken by writ of error to a higher Court and was not finally disposed of until nearly six years later. Was it the duty of the Receiver, all these six years, to leave this property of the Land Company to which no one else had as yet succeeded in finally establishing any adverse title or to obey the order of the Court appointing him and take the land into his custody, subject to any good adverse title which might thereafter be established in the State ejectment action whenever such title should be shown to be established to the satisfaction of the Court which appointed the Receiver? The question suggests its own answer and to our mind there would seem to have been no course open to the Receiver other than the one he took. Now, if John B. Laidley subsequently became entitled to the possession of this land by reason of any proceedings in the State Court, it was his duty to file a petition in the receivership cause in the Federal Court setting forth the facts

and asking to have such possession delivered to him. Laidley, however, did nothing of the kind, and has never applied for leave to intervene in the Receivership proceedings. The Receiver, however, long before the State ejectment action was finally decided, brought the present suit against Laidley setting up an equitable cause of action to which the State Court cases were no bar, and asking to have Laidley declared a trustee for the Land Company of any title which he had acquired by reason of his deed from Mrs. Pennybacker, which title was many years thereafter finally established in the State Court cases.

The rule, therefore, invoked by the Court below was that the mere prior commencement of an action of ejectment, without any possession or attempt to take possession of the property, prevented ever thereafter, during the continuance of such ejectment action, the bringing of any cause in the Federal Courts for the purpose of winding up the affairs of the Land Company and taking possession of its property in order to equitably administer the same.

We do not understand that any such doctrine was ever asserted or upheld in the decisions of this Court. The cases, as we think, all sustain the proposition that the test of exclusive jurisdiction is determined by the actual physical seizure of the property and there is not to be found in them even a suggestion that the time of the commencement of the action was of any importance.

Wiswall vs. Sampson, 14 How., 52, is one of the earlier cases upon this subject. The facts were as follows :

The plaintiff below brought an action of ejectment against Wiswall and claimed title to the land under two judgments against one John Ticknor, recovered in the United States Circuit Court of Alabama, in December, 1840. Executions were issued upon these judgments within the year and were returned unsatisfied.

Alias executions were issued and the land in question was levied on under one execution on February 24, 1845, and under the other on April 7, 1845, and sold under both executions upon the 7th of July, 1845, when it was bought in by the lessors of the plaintiff, who claimed title under this sale.

The defendant Wiswall gave in evidence a judgment in his favor against Ticknor, rendered in the State Court June 14, 1842, and an execution issued on the 1st of July in the same year, which was returned unsatisfied; also a deed of the lot in question from Ticknor to one Day, dated April 28, 1840, and an exemplification of a decree and proceedings in chancery on a bill filed February 7, 1843, by Wiswall against Ticknor and Day, setting aside the deed to Day as fraudulent The decree in the State Court Chancery proceedings was rendered in April, 1845, and a Receiver appointed by the State Court took possession of the property on the 27th of June of the same year. The Receiver remained in possession until the lot was sold by the Master March 1, 1847, under the decree in the State Chancery cause, and bought in for the defendant Wiswall, who claimed under this title.

The facts to which we especially call the Court's attention are that the Receiver was appointed by the State Court, and took possession of the property upon the 27th day of June, 1845, and that the sale under the executions issued by the Federal Court under judgment entered long prior to the commencement of the receivership proceedings, took place upon the 7th of July, 1845. It was held by this Court that, the State Court having taken possession of the property through its Receiver, any sale thereafter under the Federal Court execution was void and illegal. The Court, speaking through Mr. Justice NELSON, said at pages 64 and 68:

> "At the time, therefore, of this sale, the Receiver was in the possession of the premises, under the decree of the Court of Chancery—in other

words, the possession and custody of them were in the Court of Chancery itself (as the court is deemed the landlord), to abide the final decree to be thereafter rendered in the suit pending. * * * As we have already said, it is sufficient, for the disposition of this case, to hold that while the estate is in the custody of the Court, as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the Court for that purpose. And upon this ground we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

This case is also interesting as showing that, whenever property has been taken into the custody of a Court by its Receiver, any claimant thereto under an adverse title must apply to the Court having such possession for any relief to which he may be entitled. Upon this point the Court said at page 68:

"We are, also, inclined to think, that the question of title to the property under the Marshal's sale is concluded between these parties by the judgment of the Court in the proceedings on the petition by the purchaser for the removal of the Receiver, and to be let into the possession. This, we have seen, is the appropriate remedy on behalf of a person claiming a paramount legal right to an estate which has been brought into the possession and safe-keeping of the Court of Chancery, pending the litigation in respect to it.

"This proceeding was explained by Lord ELDON in Angel vs. Smith, 9 Ves., 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of Receivers. 'Where sequestrators,' he observed, 'are in possession under the process of the Court, their pos-

session is not to be disturbed, even by an adverse title, without leave, upon this principle: that the possession of the sequestrators is the possession of the Court and the Court, being competent to examine the title, will not permit itself to be made a suitor in a Court of law, but will itself examine the title. And the mode is by permitting the party to come in to be examined *pro interesse suo*; the practice being to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the Court upon it.'"

The still earlier case of Hagan vs. Lucas, 10 Pet., 400, 403, states the law to be that "the first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other."

In Pulliam vs. Osborne, 17 How., 471, it appeared that executions upon judgments obtained in the Federal Court were issued to the Marshal prior to the issue of executions under the State Court judgment under which the property was seized and sold. In an action brought in the United States District Court for the Middle District of Alabama, for the trial of the right to property taken under the execution from that Court, the jury were instructed that a sale under a junior execution from the State Court did not divest the lien of the execution from the District Court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the State Court. The theory of the lower Court was that the lien of the Federal Court execution should be given priority because it was delivered to the Marshal before the State Court execution was delivered to the Sheriff, but this Court declined to consider the question of time, except so far as the actual seizure of the property was concerned, and reversed the case squarely upon the ground that the State Court having first acquired actual physical possession of the property

under its process was entitled to dispose of it. At page 475 the Court said:

> "The District Court instructed the jury that a sale under a junior execution from the State Court did not divest the lien of the execution from the District Court, and that the writ might be executed notwithstanding the seizure and sale under the process from the State Court.
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> "The lien of an execution under the laws of that State commences from the delivery of the writ to the Sheriff, and the lien in the Courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the State or United States for the determination of the priorities between the creditors of the respective Courts—State and Federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.
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> "The demands of the respective creditors in the present instance were reduced to judgments, and the officers of either Court were invested with authority to seize the property.
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> "The liens were, consequently, co-ordinate or equal, and, in such cases, the tribunal which *first acquires possession of the property by the seizure of its officer may dispose of it*, so as to vest a title in the purchaser, discharged of the claims of creditors of the same grade."

Of the later cases the three decisions by Mr. Justice MATTHEWS in Gumbel vs. Pitkin, 124 U. S., 131; Heidritter vs. Elizabeth Oil-Cloth Company, 112 U. S., 294, and Covell vs. Heyman, 111 U. S., 176, are perhaps the most valuable contributions of any single Judge to this question of law.

The facts in the Gumbel case are as follows:

On Saturday, the 27th day of October, 1883, Gum-

bel instituted a suit in the State Court of Louisiana against one Joseph Dreyfus, and obtained a writ of attachment. The Sheriff, on Monday morning, October 29, 1883, attempted to make a levy upon the property of Dreyfus, but found his store in the possession of the United States Marshal under writs of attachment issued by the Federal Court on Sunday, October 28, 1883, and levied by the Marshal upon the same day, in actions commenced in said Court against Dreyfus by other creditors who were non-residents of Louisiana. Under the common law and statute law of Louisiana the writs under which the United States Marshal held the property were absolutely null and void. Subsequently, and on Monday, October 29, 1883, other writs were issued by the Federal Court, under which the Marshal took possession of the property and sold it.

On November 16, 1883, Gumbel recovered judgment in the State Court "with lien and privilege on the property herein attached, and that plaintiff's claim be paid by preference over and above all other creditors, with costs of suit," and, on December 6, 1883, a rule was granted by the State Court requiring the United States Marshal to show cause why he should not desist from interference with the Sheriff in the custody of the attached property, *or be punished for contempt of the Court in obstructing the execution of its orders and judgments.* A rule was also granted December 18, 1883, requiring the Marshal and the attaching creditors in the Federal Court to show cause why the property seized under the State Court attachment obtained by Gumbel should not be sold. Some of the defendants to these rules excepted to the jurisdiction of the State Court to issue them on the ground that the State Court was incompetent to distribute the property, "*for the reason that the said property was in the hands of the United States Marshal under attachment issued by order of the judge of the*

Circuit Court of the United States for the Eastern District of Louisiana."

Upon the filing of this objection to the jurisdiction of the State Court, the rules and exceptions were " by consent of counsel ordered to be continued indefinitely."

Thereafter by leave of Court Gumbel filed a petition of intervention in the actions pending in the United States Circuit Court in which the United States Marshal had levied on the property, setting forth the facts of his case, and attached as an exhibit a transcript of the proceedings in the State Court in the case of Gumbel against Dreyfus.

Judge MATTHEWS, referring in his opinion to the course which Gumbel had pursued in filing a petition of intervention, said, at page 143, " It may be remarked in the outset, that, if the intervenor is entitled to any relief, the mode in which he has sought it is appropriate," so that we have indicated by this court the proper and only practice in a case where a party in a State court action feels that he has been aggrieved by the course of the Federal Court in seizing property in a proceeding therein—*i. e.*, by intervention in the latter Court.

Again, at page 145, it was said :

> " It thus appears that the plaintiff in error came rightfully into the Circuit Court for whatever relief, either of a legal or equitable nature, that Court was competent to give. *It is equally true that he must depend exclusively on the Circuit Court for such relief* as he can there obtain, for it is quite clear that the Civil District Court acquired no jurisdiction over the property under the writ of attachment held by the Sheriff. * * * *The Sheriff acquired no such possession of the property as to bring it within the custody of the State Court.* * * * *The Circuit Court alone had jurisdiction to inquire into and determine all ques-*

tions relating to the property and the rights growing out of its custody held by its own officer under color of its authority."

This Court eventually decided that Gumbel was entitled to intervene, and that the prayer of his petition of intervention should be granted, but were most strongly of opinion that that question was solely for the Federal Court, which "acquired jurisdiction, by virtue of the seizure under color of its authority, to decide all questions concerning it" (p. 156).

There never was any question but that the writs under which the Marshal had seized the property were absolutely null and void, and his action in making the seizure is constantly condemned by the Court in the course of his opinion as illegal, improper and wrongful. At page 147 it was said: "No more flagrant instance of a violation of that fundamental principle can be conceived than that which is furnished by the circumstances of the present case. The very ground, and the sole ground, on which relief is denied to the plaintiff in error, is that he has been prevented from asserting it legally by the violence and wrong of those who now deny it."

Notwithstanding its characterization of the conduct of the Marshal and of the creditors in the case in the Federal Court, this Court was unwavering in its support of the principle that the wrong committed by the Marshal must be righted in the Federal Court, and in that Court alone, for the reason that the Federal Court had actual physical possession of the property.

The conclusion to be drawn from this decision of Mr. Justice MATTHEWS is that the Court which first takes actual physical possession of the property has exclusive jurisdiction of all matters in regard thereto, and that this doctrine is entirely unaffected by the question of which case was first commenced. We urge upon the Court the fact that in the Gumbel case proceedings were first begun in the State Court, but that

this Court considered such fact to be of no importance in determining the question of exclusive jurisdiction, which was held to be fixed solely by the priority of the seizure of the property.

Of course, we do not pretend to argue that by any Court taking property into its custody litigants in the other Court lose any of their rights, but simply that such litigants must, in effect, transfer their claims to the Court which has the property, and apply to such Court for a determination of their rights. As was said in the Gumbel case at page 156:

> "The case, therefore, stands thus: For the reasons growing out of the peculiar relations between Federal and state courts exercising co-ordinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto; the plaintiff in error having pursued his remedy by action against his debtor in the state court, to which alone, by reason of citizenship, he could resort, attempted the levy of his writ of attachment upon the goods in the possession of the marshal; not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee; not being able by this process to subject the marshal to answer personally to the state court, he made himself a party to the proceedings in the Circuit Court by its leave, and proceeded in that tribunal against its officer and the creditors for whom he had acted; on a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual. It was competent for the Circuit Court,

and, having the power, it was its duty to hold the marshal liable as garnishee, and, having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties on the footing of these rights, and give to the plaintiff in error the priority over all other creditors, to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled."

We believe that the Gumbel case is decisive of the present controversy, and before leaving it we desire to again call the attention of the Court to the fact that the seizure by the Marshal, Pitkin, was illegal and improper, and that this Court held that, notwithstanding such fact, the property was in the exclusive custody of the Federal Court, in which forum all claims thereto must be tried. If an illegal seizure under color of right places the property in the exclusive custody of the Court taking possession, so much more should it be so when there is nothing wrong or improper or illegal in the seizure, as in the case at bar, where there was nothing else for the Receiver to do when appointed by the Federal Court except to take possession of the property of the Land Company.

The case of Covell vs. Heyman, 111 U. S., 176, was brought to this Court by writ of error to the State Court of Michigan, and it appeared that the plaintiff below had brought an action of replevin against the defendant Covell to recover specific personal property to which she claimed title. The defendant Covell was a Deputy United States Marshall, and as such had possession of the property replevied by virtue of an execution issued upon a judgment of the Circuit Court of the United States for the Western District of Michigan. A judgment for the defendant was entered in the trial Court, and reversed by the Supreme Court of Michigan. This Court reversed the Supreme Court of

Michigan, and affirmed the judgment of the trial Court upon the ground that the property, being in the custody of the Federal Court and in charge of its officer, could not be interfered with by the State Court. In the course of his opinion Mr. Justice MATTHEWS, in referring to the well-known case of Freeman vs. Howe, 24 How., 450, said at pages 179, 182 and 184:

> "The point of the decision in Freeman vs. Howe, *supra*, is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the Court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the Court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; *that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the Court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that Court:* but that all other remedies to which he may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the Court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject matter. And *vice versa*, the same principle protects the possession of property while thus held, by process issuing from the State Courts, against any disturbance under process of the Courts of the United States.
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"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but, between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decision of questions relating to it are part of the jurisdiction of the court from which it issues.

* * * * * *

"Property thus levied on by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him. That was the defense made and relied on by the plaintiff in error in the

present case, and to which the Supreme Court of Michigan refused to give its due and conclusive effect. For that error its judgment is reversed."

Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S., 294, was an action of ejectment originally begun in the State Court of New Jersey, and removed into the United States Circuit Court for that district. The precise question involved was whether the plaintiff acquired the legal title to the premises in controversy by virtue of a deed from the Sheriff, it appearing that before the proceedings upon which it was based had been begun the property had been taken possession of in a proceeding in the Federal Court, under which the defendant obtained its title thereto. The rule of law was again stated by Mr. Justice MATTHEWS with great force and accuracy, and stress was laid upon the fact that the only practical test of exclusiveness of jurisdiction is actual physical possession of the property involved. The title acquired in the proceeding in which the property had been taken into the custody of the Court was sustained, and the Court said at page 305:

"This view, though decisive of the case and resulting in the affirmance of the judgment of the Circuit Court, proceeds upon assumptions the most favorable which can be indulged to the plaintiff in error. It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as is the case here, it concerns those of a State and of the United States, constituted by the authority of distinct governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of

comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction. It was in accordance with this principle that in Pulliam vs. Osborne, 17 How., 471, this court confirmed the legal title of land to a purchaser under an execution upon a judgment rendered in a State court, because first actually levied as against one claiming under an execution of the District Court of the United States, which had a priority of lien by reason of having been first issued."

This principle was again referred to by Mr. Justice MATTHEWS in the case of Ellis vs. Davis, 109 U. S., 485, 498, when he cited the case of Payne vs. Hook, 7 Wall., 425, as holding

> "That the jurisdiction of the Circuit Court of the United States, in a case for equitable relief, was not excluded, because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; *but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the res which is the subject of the litigation is entitled to administer it.*"

In Byers vs. McAuley, 149 U. S., 608, Mr. Justice BREWER stated the doctrine at page 614 as follows:

> "In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this Court, and, first, it is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot

be disturbed by process out of another Court The doctrine has been affirmed again and again by this Court."

Moran vs. Sturges, 154 U. S., 256, is one of the most interesting as well as one of the later cases which discuss this subject. The case came to this Court by writ of error to the Court of Appeals of the State of New York. Mr. Chief-Justice FULLER delivered the opinion of this Court, and Mr. Justice PECKHAM, then one of the Judges of the New York Court of Appeals, delivered the opinion of the Court below. The facts were as follows :

On July 31, 1891, the trustees of the Schuyler Steam Tow-Boat Company filed a petition in the State Court for the voluntary dissolution of the company and prayed for the appointment of a Receiver, and an order was thereupon entered appointing one Sturges temporary receiver of the property, and directing such Receiver, before he entered upon his duties as Receiver, to execute and acknowledge in due form of law a bond in the penal sum of $50,000. This order was entered and the petition and accompanying papers filed in the office of the Clerk of the State Court in the forenoon of August 1, 1891.

On the afternoon of August 1, 1891, which was Saturday, and on Monday, August 3, 1891, the plaintiffs in error filed libels in admiralty in the United States District Court of the Eastern District of New York, and certain of the vessels in question were seized by the United States Marshal under the process of the Admiralty Court upon the 1st of August, 1891, and the rest upon August 3, 1891.

On August 4, 1891, the State Court Receiver went on board the vessels and ascertained that the United States Marshal had taken charge thereof. The Receiver then took various proceedings in the Federal Courts for relief which were unsuccessful, and eventually filed a petition in the State Court setting forth

the facts and praying for an injunction enjoining the plaintiffs in error from prosecuting the libels which they had filed in the Federal Court. The State Court granted the injunction, and the order granting such injunction was affirmed in the General Term and the Court of Appeals of the State. The case was reversed by this Court upon the ground, among others, that, although the proceeding in the State Court was begun prior to the libel cases in the Federal Court, yet that the Marshal under the process in the latter cases had taken the first actual physical possession of the vessels in question.

The exact question presented in the State Courts is well stated by Mr. Justice PECKHAM in his decision in the Court of Appeals (136 N. Y., 169, 172), as follows:

> "The Courts below have held that, by the proper presentation of a petition to a State Court praying for the dissolution of the corporation, and by the appointment of a Receiver upon due notice of the application to the Attorney-General, the Court acquired jurisdiction of the subject matter of the proceeding, and took the property of the corporation into the custody of the law for the purpose of due administration, and that, having thus acquired jurisdiction of such subject matter, and taken the property into the custody of the law, although the Receiver had not actually and physically seized and taken it into his manual possession, the State Court acquired the exclusive jurisdiction and right to take such possession and make a final decree, and that the libellants acquired no rights under their process and should not be permitted to further proceed in the District Court. The libellants, on the other hand, contend that this is a question of jurisdiction over the particular property, and that Court obtains it which through its process and officer first actually seizes and takes possession of the property itself,

> and that, although the Receiver may have had a prior right to take possession, it was not exercised before actual possession was taken under the process from the U. S. Court, and *hence the first manual possession must determine the question of jurisdiction.*"

In the opinion in the Moran case there is much discussion by the Court speaking through Mr. Chief Justice FULLER of the exclusive jurisdiction of the Admiralty Court over all admiralty cases, but as we read the case the decision was not in any way placed upon this ground and the conclusion of the Court upon this point was simply that, if the State Court first obtained jurisdiction over the vessels in question, then such Court can only deal with the property subject to the admiralty liens. As to this the Court said at page 283 :

> " We think it entirely clear that, as a State court is without jurisdiction to enforce maritime liens, so it is incapable of displacing them, and, therefore, though under the rule laid down in Taylor vs. Carryl, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto ; and when its jurisdiction has determined the admiralty courts may proceed."

The Court immediately thereafter went on to say that the facts in the case before it did not show any such previously acquired jurisdiction in the State Court as required the admiralty Court to wait until such State Court had dealt with the vessels in question subject to the admiralty liens. In other words, this Court held that by the prior commencement of the receivership proceedings in the State Court, such Court did not take the property in question into its custody and obtain exclusive jurisdiction of proceed-

ings in regard to it, as against the actual physical possession thereof taken by the United States Marshal under the process of the admiralty Court. As to this it was said at pages 283 and 286.

> " But, upon the facts disclosed in this record, was the District Court required to stay its hand until the termination of the proceedings in the State Court ? It is admitted that the Receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels (p. 283). * * * We are of opinion that the State Court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed ; that the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance ; that the District Court had jurisdiction ; and that the judgment under review was in effect an unlawful interference with proceedings in that Court " (p. 286).

That the fact of who had possession determined the question of jurisdiction, and that if the Receiver had obtained actual possession of the vessels before the Marshal this Court would have left the controversy in the State Court, is very apparent from the remark in the dissenting opinion of Mr. Justice BREWER, concurred in by Mr. Justice WHITE, when he said at page 288 : " I cannot agree that the respective jurisdiction of State and Federal Courts is to be determined by a scramble between Sheriff and Marshal for possession."

In Shields vs. Coleman, 157 U. S., 168, it was held that, as between the Federal Court, in which suit was first commenced, and the State Court, which actually seized the property first in a suit subsequently begun, the State Court had exclusive jurisdiction and the Federal Court had no power to appoint a Receiver and

take the property out of the hands of the State Court Receiver. The following are the facts in the case :

On the 6th of June, 1892, an order was entered in a suit in the Circuit Court of the United States for the Eastern District of Tennessee appointing one Hoyle Receiver of the property of the Morristown and Cumberland Gap Railroad Company. The Receiver took possession of the property, but afterwards was discharged on or about the 8th of June, 1892, upon the railroad company giving a bond for whatever sum might be decreed in favor of the complainant. The cause proceeded and various steps were taken therein until on or about the 12th of November, 1892, when a second Receiver of the railroad company was appointed and ordered to take possession of its property.

In the meantime, and on or about October 28, 1892, a bill was filed in the State Court and a Receiver was appointed on that day, who took possession of the property of the railroad company, and continued in possession until the Receiver appointed by the Federal Court on November 12, 1892, took it out of his hands.

The Receiver appointed by the State Court then made application to the Federal Court to have the property restored to him, upon the ground that the State Court had first taken actual physical possession of the property, although the Federal Court suit was first begun. The application was denied, and from the final decree entered in the Federal Court an appeal was taken to this Court, where the case was reversed and the property ordered to be restored to the State Court Receiver, inasmuch as the State Court first had actual physical possession of the property in question. Mr. Justice Brewer in the course of his decision said at page 177 :

> " Had the Circuit Court of the United States, when this property was in the possession of the Receiver appointed by the State Court, the power

to appoint another Receiver and take the property out of the former's hands? We are of opinion that it had not."

The importance of this decision is in the fact that the suit in the Federal Court (which Court was held not to have jurisdiction) was begun before the suit in the State Court, and that this Court gave no consideration to this, but decided the case upon the ground that the Court which first took actual physical possession of the property was entitled to exclusive jurisdiction thereof until the end of the litigation without regard to the relative date of the commencement of the conflicting controversies.

In the case of *In re* Chetwood, 165 U. S., 443, 460, the Court again reiterated the doctrine in these words:

> "The doctrine is firmly established that where * * * property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction."

In the case of *In re* Johnson, Petitioner, 167 U. S., 120, 125, it was said:

> "We know of no reason why the rule, so frequently applied in cases of conflicting jurisdiction between Federal and State Courts, should not determine this question. Ever since the case of Ableman vs. Booth, 21 How., 506, it has been the settled doctrine of this Court that a Court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other Court has the right to interfere with such custody or possession."

The following cases are all to the effect that the actual physical seizure of the property involved determines the question of jurisdiction as between the State and Federal Courts:

Brown vs. Clarke, 4 How., 4.
Peale vs. Phipps, 14 How., 368.
Taylor vs. Carryl, 20 How., 583.
Freeman vs. Howe, 24 How., 450.
Buck vs. Colbath, 3 Wall., 334.
Riggs vs. Johnson County, 6 Wall., 166, 196.
Lammon vs. Feusier, 111 U. S., 17.
Rio Grande Rd. Co. vs. Gomila, 132 U. S., 478.

It would seem clear from these authorities that in the present case the prior taking of the Pennybacker tract into the custody of the United States Circuit Court for the District of West Virginia through its Receiver appointed for the purpose of winding up the affairs of the Land Company gave such Court jurisdiction over all subsequent proceedings in regard to this land. That is to say, when the Receiver was appointed by the Federal Court the Pennybacker tract was the property of the Central Land Company. It is true that at the time of the Receiver's appointment an action of ejectment involving this land was pending in the State Court and that such action might eventually result in a writ of possession being issued therein directing the Sheriff to take possession of the land and deliver such possession to one of the parties to such action. This, however, had not been done in the State Court action at the time the Receiver was appointed by the Federal Court, and might never have been done. In fact the State court ejectment action was not finally terminated until nearly six years later. The land was the property of the Land Company when the Receiver was appointed and he took possession thereof, as was his duty as such Receiver to do. If subsequent to the appointment of the Receiver and his taking the land into his custody

the action of ejectment in the State Court was carried to a conclusion and a writ of possession entered therein, then the party awarded the possession of the property was entitled to intervene in the Receivership proceedings in the Federal Court by a petition setting forth the facts and asking to have possession of the property delivered to him.

In short, the right of the Receiver to take possession of this land along with the other property of the Land Company was not affected in any way by the ejectment action in the State Court and such possession did not in any manner interfere with or otherwise affect the ejectment action and the carrying it through to its conclusion and the issue of process to execute the judgment therein. The only result of the seizure of the land by the Receiver was that the land could not be seized by the Sheriff under the process of the State Court, inasmuch as it was in the custody of the Federal Court, but the party awarded the writ of possession in the State Court was entitled to apply to the Federal Court for relief and ask the Federal Court to award the property to him because of the writ of possession obtained by him in the State Court.

The situation here is very similar to that arising in Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S., 294, where it was said that the seizure of the property by the Federal Court in no way prevented the proceeding in the State Court under the Mechanics' Lien Law from being carried to a final judgment, but that the final process of the State Court could not be levied upon the land because it was already in the possession of the Federal Court. As to this Mr. Justice MATTHEWS said at page 304 :

> " But it is understood, as a qualification of what has been said, that we do not mean to decide that the plaintiffs in the actions in the State court might not, without prejudice to the jurisdiction of

the District Court, commence their actions, so far as that was a step required by the mechanic's lien law of New Jersey, for the mere purpose of fixing and preserving their rights to a lien, provided, always, they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoiding the jurisdiction of the District Court under its seizure. That was the course, under similar circumstances, adopted and sanctioned by the Supreme Judicial Court of Massachusetts in Clifton vs. Foster, 103 Mass., 233, where a petition to enforce a mechanic's lien, which, by statute, it was necessary to file within a fixed time in order to preserve it, was permitted to be filed after the property, by the bankruptcy of the owner, had passed into the custody of the District Court, but all further proceedings thereon were stayed to await the action of that court in the bankruptcy proceedings on the ground that such seasonable filing was necessary to keep the lien alive, and that, without further proceedings, it could not be construed as an encroachment upon the jurisdiction of the bankruptcy court. The distinction seems to us reasonable and just, and is supported by the decisions in Williams vs. Benedict, 8 How., 107, and Yonley vs. Lavender, 21 Wall., 276. In conformity with it, we refrain from pronouncing the proceeding in the State court of New Jersey invalid, so far as they do not affect the legal title of the purchaser at the marshal's sale to the premises in controversy. We decide, not that they are invalid for the purpose of declaring and establishing the lien, but that they are not good for the purpose of enforcing it, as was attempted by a sale and conveyance of the premises in controversy."

In the case at bar the judgment in favor of the plaintiff in the State Court ejectment action was en-

tered upon the 12th day of September, 1890 (Record, p. 347), and a stay of the execution of such judgment for sixty days was granted to enable the Land Company to apply to the Supreme Court of Appeals for a writ of error to such judgment. On the 14th day of November, 1890, the Supreme Court of Appeals denied the application for a writ of error (Record, p. 401). Thereafter and on the 7th of July, 1891, a writ of error from this Court to the Supreme Court of Appeals of West Virginia was granted, and the cause was decided on February 26, 1896, when it was dismissed for want of jurisdiction (Record, p. 410).

Now, it would seem clear that the Receiver appointed by the Federal Court upon November 12, 1890, to wind up the affairs of the Land Company, was under no obligation to disobey the order of the Federal Court and fail to take possession of the Pennybacker tract, because of an ejectment action pending in the State Court which was not determined until nearly six years thereafter, and which might then have terminated in favor of the Land Company. In other words, a Receiver appointed by any Court, whether State or Federal, and directed to take into his custody and control real estate, is not prevented from taking such possession and custody thereof because of the pendency in a court of concurrent jurisdiction of an action of ejectment relating to the title to such land against the corporation of which he is the Receiver. Such possession does not interfere with the progress of the ejectment action, and, if the plaintiff therein should ultimately be successful, he simply applies to the Court which has the possession thereof for a restoration of the property to him, instead of levying directly upon the property under process of the Court in which he has successfully established his title.

If we are right as to this and if the temporary Receiver Enslow was entitled to take possession of the Pennybacker tract and to turn such property over to the special Receiver Huntington, then it would

certainly seem plain that Huntington, as such Receiver, was required and it was his duty to bring a suit upon newly discovered evidence to have Laidley declared a trustee for the Land Company of whatever title to the Pennybacker tract was established in him by reason of the State Court ejectment action, and that the Circuit Court of the United States had jurisdiction of such equitable action so long as the necessary difference of citizenship existed, and certainly was not ousted of such jurisdiction by the State Court ejectment action.

The point which we desire should not escape the Court's attention is that the question of the prior seizure of this property does not lie between the present cause and the State ejectment action, but between the cause in which the Receiver was appointed to wind up the affairs of the land company and the ejectment action, and the questions presented to the Court are :

FIRST. IS A RECEIVER APPOINTED BY A FEDERAL COURT IN A PROCEEDING BROUGHT TO DISSOLVE A CORPORATION PREVENTED FROM TAKING POSSESSION OF THE PROPERTY OF SUCH CORPORATION BECAUSE OF THE PRIOR COMMENCEMENT IN THE STATE COURT OF AN ACTION OF EJECTMENT INVOLVING SUCH PROPERTY?

SECOND. IF NOT, THEN IS THE FEDERAL COURT, WHICH HAS THE PROPERTY IN ITS POSSESSION, *without jurisdiction* OF A SUIT IN WHICH THE REQUISITE CITIZENSHIP APPEARS AND THE AMOUNT REQUIRED BY STATUTE IS INVOLVED, BROUGHT BY ITS OWN RECEIVER UPON A NEW STATE OF FACTS FOR THE PURPOSE OF HAVING THE SUCCESSFUL PARTY IN THE EJECTMENT ACTION DECLARED A TRUSTEE OF THE TITLE ACQUIRED BY HIM THEREIN?

I.

The answer to the first question is, we think, to be found in the authorities which we have cited from the reports of this Court, and perhaps the most happy

statement of the doctrine is that of Mr. Justice BRADLEY in Wilmer vs. The Atlanta and Richmond Air Line Railway Co., 2 Woods, 409, 427, when he said:

> "The test, I think, is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which Court first acquired jurisdiction over the property. * * * Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; *and, until it is seized, no matter when the suit was commenced, the Court does not have jurisdiction.*"

II.

As to the second question, our position is this:

The Receiver of this Court, having taken possession of this land in regard to the title to which there were then pending certain actions of ejectment in the State Court, afterwards ascertained facts which were not litigated in the State Court, which were in no way connected with the matters tried in such ejectment actions and which were not known at the time of the trial of such actions.

These facts so learned by the Receiver establish an entirely new and independent equitable cause of action in no way related to or connected with the ejectment actions. This cause of action, briefly stated, is that Laidley, although he may have acquired the title to this property by reason of the deed of Mrs. Pennybacker and the ejectment actions in the State Court, holds that title in trust for the Special Receiver of the Land Company by reason of the confidential relations between himself and his father, Albert Laidley, knowledge of which relations was obtained by such Receiver long after the trial of the ejectment action in the State Court. IT IS SIMPLY AN APPLICATION OF THE FAMILIAR DOCTRINE THAT AN

ATTORNEY CANNOT TAKE ADVANTAGE OF AN AFTER ACQUIRED TITLE TO THE INJURY OF HIS CLIENT.

It will be noticed that this equitable cause of action is an entirely distinct and independent cause of action, having no connection with the State Court ejectment actions. The amended bill simply states facts from which it appears that the title acquired by Laidley from Mrs. Pennybacker and sustained in the ejectment actions is held by him as trustee for the Special Receiver of the Land Company. It is a new cause of action arising on new facts. It is also a cause of action clearly within the equitable cognizance of this Court, and this Court also has jurisdiction of the case by reason of the difference of citizenship of the parties, the amount involved and the further fact that it is brought by its own Receiver.

Suppose these ejectment actions had been brought in the Federal Court and that Laidley had been successful. Afterwards the Receiver acquires knowledge of the matter alleged in this amended bill. Would he be prevented in any way from filing a bill setting up these facts and asking to have it declared that Laidley's title, acquired in the ejectment actions, was held by him as trustee? We take it that the right to bring such a suit would be unquestioned.

It is not clear how any distinction is to be drawn from the mere fact that the ejectment action was brought in the State Court. It does not follow simply from that fact that the Receiver is without remedy and cannot have Laidley declared a trustee for him, because of the facts which he has ascertained in regard to Laidley's relations with his father, Albert Laidley, Huntington's attorney. Nor does it follow that whatever remedy or relief the Receiver seeks must be obtained in the State Court.

If the Receiver in his bill and amended bill states facts which make out a case for equitable relief under the recognized rules of equity, and this Court has jurisdiction of the cause by reason of the difference of

citizenship of the parties, there is nothing to prevent the Receiver from taking his choice of forums and electing to have Laidley declared either in the Federal Court or the State Court, as he deems best, a trustee, *mala fide*, for him of the title which Laidley acquired to the land by the Pennybacker deed and which was sustained in the State Court ejectment actions.

In Arrowsmith vs. Gleason, 129 U. S., 86, it appeared that Gleason was the guardian of Arrowsmith when the latter was an infant. Gleason applied to the Probate Court of Defiance County, Ohio, for leave to sell certain lands inherited by his ward from his father. The application was granted and Gleason sold a portion of the land, and after some years another portion of it. The sales were confirmed and approved by the Probate Court.

After Arrowsmith became of age he discovered, as he thought, that the sales of a portion of the land made by his guardian were made in fraudulent collusion with another man named Harmening, whose heirs then held the land. It seems from the opinion that Arrowsmith *brought an action of ejectment in the State Court against the heirs of Harmening, and was defeated.*

After being defeated in the State Court Arrowsmith filed a bill in the Federal Court charging collusion and fraud between his guardian Gleason and Harmening, and alleging that the sales made by Gleason were in violation of his trust, and in fraud of his (Arrowsmith's) rights, "as the said Harmening and the said Gleason well knew."

It was contended in the Arrowsmith case that the complainant was without remedy in the Federal Court as any interference with the orders and judgments of the State Court would be in violation of Sec. 720, U. S. Revised Statutes. This contention was, however, overruled by the Supreme Court, which held, speaking through Mr. Justice HARLAN, at page 97, as follows :

"But is the appellant without remedy for the wrong alleged to have been done him? We think not. If all the substantial averments of his bill are true—and, upon demurrer, they must be so regarded—he makes a case of actual fraud, upon the part of his guardian, in which Harmening to some extent participated, or of which, at the time, he either had knowledge or such notice as put him upon inquiry. According to these averments, there was no necessity whatever for these sales, at least for the sale of the east half of the south-west quarter of section thirty-six, township four north, range three east, in Defiance County, containing eighty acres, or of the smaller tract in Paulding County, or of the four hundred acres in Defiance County that were sold in December, 1874. It is alleged, and by the demurrer it is admitted, that, when the last sale was made, Gleason had in his hands unexpended, as Harmening well knew, large sums derived from the previous sales, as well as considerable amounts received from releases of tax titles on lands held by appellant; and yet, by collusion with Harmening, and in order that the latter might get the lands for less than their value, he made the sale of the four hundred acres.

"But it is insisted that the Circuit Court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for; namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. *But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these*

lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts (pages 97 and 98). * * *

" While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this Court show that the proper Circuit Court of the United States may, without controlling, supervising or annulling the proceedings of State courts, give such relief, in a case like the one before us, as is consistent with the principles of equity " (p. 99). * * *

" *These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained.* As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that Court may, by its decree, lay hold of the parties, and compel them to do what according to the

principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion" (p. 101).

This same principle was again declared by the Supreme Court in Marshall vs. Holmes, 141 U. S., 589, when it was said at page 596:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although in view of the large powers now exercised by courts of law over their judgments, a court of the United States sitting in equity will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment: and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery (p. 596). * * *

"*These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments.* A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a Court of the United States from grant-

ing a writ of injunction to stay proceedings in a State court (pp. 599 and 600). * * *

"While the Court, upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner. It was not, however, for the State Court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance it was for that Court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained" (pp. 600 & 601).

In Jackson vs. Ludeling, 21 Wall., 616, 633, it was claimed that a bill could not be filed in the Federal Court which sought to have a title to property obtained by the defendants in a State Court and made binding and effectual against all the world by what was called a judgment of homologation declared to be held by such defendants as trustees *mala fide* for the complainants. This contention was not sustained, and the Court said, at page 634:

"Fraud and trust are entirely outside the record. A sale may have been conducted legally

> in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property as a trustee. In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon faithlessness to trusts and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence."

In Rolling Mill Co. vs. Ore and Steel Co., 152 U. S., 596, 615, it was said by Mr. Justice JACKSON that

> "It is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where, in justice and good conscience, it ought not to be enforced, as where there is a meritorious, equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing."

The doctrine of the cases just cited would seem to be that if a party has an equitable cause of action he is not debarred and precluded from asserting it in a Federal Court simply because at some previous time there have been cases and judgments in the State Court relating to the same subject matter. To apply this doctrine to the facts in the present case, there would seem to be no reason why Huntington, as Special Receiver, should not assert and prove in the Federal Court that Laidley's title to the Pennybacker tract, which Laidley succeeded in establishing in the State Court ejectment action, was, by reason of new facts discovered since the trial of the ejectment action,

held by Laidley in trust for the Land Company. If Huntington, as Special Receiver, should make out the case as alleged in the bill, and the Federal Court should give him the relief prayed for and should declare Laidley to be trustee for the Land Company of the title acquired by him from Mrs. Pennybacker in 1882, such relief would not in any way set aside or vacate the judgments of the State Court, or invade or impinge upon the title thereby determined. The Federal Court would simply decide the case then before it and grant the relief the parties were entitled to upon the facts then presented. In other words, the relief sought is not to overturn the State Court judgments. It is not asked that such judgments should be vacated and set aside, but that, by reason of facts subsequently learned, the title established under such judgments should be held in trust by Laidley for the Land Company. That is to say, a decree in this cause in favor of the complainant would operate directly upon Laidley, would declare him to hold the title acquired by him from Mrs. Pennybacker, as trustee for the complainant, because of his relations with his father, Huntington's attorney, and would in no way violate the provisions of the Federal Statute prohibiting a Court of the United States from interfering with or enjoining the proceedings of a State Court.

It would seem clear that the extreme effect which, under any circumstances, can be given to the State Court cases is that they constitute a bar to the present case. This is a matter of defense to be set up by plea of *res adjudicata* or answer and to be proved. It has been so set up once in this suit by plea and the defense was overruled, and it was held that the bill did state a good cause of action, which was in no way barred by the State Court judgments. In any event such a defense does not raise any question of the jurisdiction of the Court to try the case, and would seem to furnish no ground for the summary dismissal of this case upon the Court's own motion under the

fifth section of the Act of March 3, 1875 (18 Stat. at Large, 470).

We, therefore, respectfully submit that the amended bill in this cause clearly establishes a good equitable cause of action against Laidley, and that the lower Court was not without jurisdiction of such equitable action, merely because actions of ejectment had been previously brought in the State Court in regard to the same land and that the complainant should be allowed to try out his case and prove the allegations of his bill.

SECOND POINT.

The decree of the Court below dismissing the cause for want of jurisdiction should be reversed.

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Of Counsel for Appellant.